United States Postal Service *and* North Jersey Area Local, American Postal Workers Union, AFL–CIO. Case 22–CA–16616(P)

February 14, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On August 31, 1990, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion to suppress evidence; and the General Counsel filed an opposition to the Respondent's motion to suppress evidence.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, Paterson, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Refusing to bargain collectively with North Jersey Area Local, American Postal Workers Union, AFL–CIO, by refusing to furnish it the requested, relevant information from the case files of supervisors Robert Bevans, George Faulkner, and Robert Malewich, and the decision for supervisor George Faulkner, which relate to disciplinary proceedings against them.''

2. Substitute the following for paragraph 2(a).

''(a) On request, furnish the Union the relevant information from the case files of supervisors Robert Bevans, George Faulkner, and Robert Malewich, and the decision for supervisor George Faulkner, which relate to disciplinary proceedings against them.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with North Jersey Area Local, American Postal Workers Union, AFL–CIO, by refusing to furnish it the requested, relevant information from the case files of Supervisors Robert Bevans, George Faulkner, and Robert Malewich, and the decision for Supervisor George Faulkner, which relate to disciplinary proceedings against them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union the relevant information from the case files of Supervisors Robert Bevans, George Faulkner, and Robert Malewich, and the decision for Supervisor George Faulkner, which relate to disciplinary proceedings against them.

UNITED STATES POSTAL SERVICES

Julie L. Kaufman, Esq., for the General Counsel.
Frances Bartholf, Esq., of Windsor, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed by North Jersey Area Local, American Postal Workers Union, AFL–CIO (the Union), a complaint was issued against United States Postal Service (Paterson Office) (Respondent) on December 22, 1989.

The complaint alleges essentially that the Respondent has unlawfully failed and refused to provide information requested by the Union. The information sought were the case

[1] We deny as lacking in merit the Respondent's motion for suppression of the names of Postal Service employees from publication.

The Respondent's motion was accompanied by a sealed envelope containing a letter from a local prosecutor. The Respondent requested that we return the letter to the Respondent if we chose not to ''review'' it. The Respondent's representations concerning the letter in no way support its argument for suppression of names, and the Respondent did not, in any event, clearly proffer it in connection with that argument. We have not opened the envelope. In our discretion, we have decided to grant the Respondent's request because the letter is not part of the record on which we have decided any issue in this case and because there is no prejudice to any party in our returning it.

[2] We note that the disclosure of information relevant to the Union's proper performance of its duties as collective-bargaining representative of unit employees is permitted, rather than mandated, by the Privacy Act.

We further note the correct cite to *Pfizer, Inc.*, is 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

[3] The complaint alleges, and the judge found, that the Respondent refused to disclose relevant information to the Union. We agree. The Union grieved employee Arthur Fiore's notice of proposed removal that specified the discipline was based on falsification of his employment application and his past disciplinary record. Specifically, the relevant information consists of all documents relating to the allegation, investigation, and disposition of the supervisors' alleged falsification of Postal Service documents, as well as the complete disciplinary file where the Respondent found the supervisor guilty of falsification or in some way used the disciplinary history in determining the supervisor's guilt or innocence regarding the falsification allegation. We shall modify the recommended Order to require the disclosure only of relevant information. Any disputes regarding which documents, or portions thereof, must be disclosed may be resolved at the compliance stage of this proceeding.

files of three supervisors who were disciplined for allegedly falsifying certain postal documents. The Union asserts that such information was needed in order to assist it in the preparation and presentation of an arbitration case involving an employee who was disciplined for falsification of his application for employment.

Respondent's answer denied the material allegations of the complaint and alleged certain affirmative defenses.

On February 7, 1990, a hearing was held before me in Newark, New Jersey. On the entire case, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States of America and operates various facilities throughout the United States in the performance of that function, including its facility in Paterson, New Jersey, the site involved here. Respondent admits, and I find, that the Board has jurisdiction over it and this matter by virtue of section 1209 of the Postal Reorganization Act.

II. LABOR ORGANIZATION

The complaint alleges that the Union, the North Jersey Area Local of the American Postal Workers Union, AFL–CIO is a labor organization, and that it has been the exclusive representative of employees in an appropriate unit. Respondent denied those allegations.

However, Respondent's answer stated that the North Jersey Area Local is a limited agent of the American Postal Workers Union, AFL–CIO (APWU) for the limited purpose of filing and processing grievances through step 2 of the contractual grievance procedure set forth in the parties' collective-bargaining contract. In addition it was stipulated that the North Jersey Area Local is the contractually authorized agent for those purposes, including the events which occurred in this proceeding. It was further stipulated that the APWU is a labor organization within the meaning of Section 2(5) of the Act.

Gary Weightman, the director of industrial relations for the North Jersey Area Local, testified that that Local is affiliated with the APWU, and has 3600 members. Employees participate in the affairs of the Local, which exists for the purpose of representing employees and does represent employees in such matters as grievances, wages, hours, and conditions of employment.

Based on the above facts, and that it is not necessary to this case to find that the Charging Party is a labor organization, I find and conclude that the APWU is a labor organization within the meaning of Section 2(5) of the Act and that the Charging Party is an agent of the APWU.

III. THE COLLECTIVE-BARGAINING UNIT

The complaint alleges that the Union has been the exclusive representative of the following employees:

> All maintenance employees, special delivery employees, motor vehicle employees and postal clerks employed by Respondent including its Paterson, New Jersey location.

Respondent's answer denied that allegation of the complaint.

The collective-bargaining agreement between Respondent and the APWU states that the Respondent recognizes the APWU as the ''exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level'': APWU—Maintenance Employees; APWU—Special Delivery Messengers; APWU—Motor Vehicle Employees; and APWU—Postal Clerks.

Based on the above, I find that the collective-bargaining unit as set forth in the complaint is accurate.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On September 25, 1989, postal clerk, Arthur Fiore, received a ''Notice of Proposed Removal,'' which stated that Respondent intended to terminate his employment. The reason for the removal was his alleged falsification of the application for employment, called a 2591 form.

The notice stated that when he completed the application in 1984, he falsely stated that he had not been convicted of a crime or currently faced charges. The notice further stated that an investigation by a postal inspector disclosed that he had been convicted a total of four times in 1974 and 1975, and that in 1977 a bench warrant was issued for his arrest, which is still outstanding.

The notice of proposed removal also provided that his past disciplinary record will be considered ''in arriving at a decision if the charge [of falsification of the application] is sustained.'' Fiore's past discipline included a letter of warning and a 7-day suspension for failure to follow instructions, and two 7-day, and one 14-day suspensions for failure to meet the attendance requirements of his position.

Union Official Weightman timely filed a grievance in Fiore's behalf, and made a request for information for the case files of three supervisors: (a) Robert Bevans, fired for falsification of postal documents; (b) George Faulkner; and (c) Robert Malowich, fired and reinstated for improperly filling out postal documents. Weightman testified that he requested those documents because he became aware of two decisions in which arbitrators compared the discipline given to employees and supervisors, and sought to use a disparate treatment argument in the arbitration of Fiore's grievance.[1]

The request for information was denied by Respondent on the ground that the requested documents were not deemed ''relevant or necessary'' because they involved nonbargaining unit employees.

Fiore's grievance was processed further without the requested information, and the grievance was denied. Weightman testified that the requested documents have not been provided.

Respondent's supervisor Karpjak testified that Respondent requires truthfulness from its bargaining unit employees and

[1] In one case, the arbitrator decided that a contractual provision providing for the disclosure of information to the union for the processing of a grievance concerning attendance violations required the Postal Service to turn over attendance records of his supervisor. In the other case, the arbitrator held that discipline given to supervisors for falsification of time records is relevant to a similar offense committed by a bargaining unit employee.

supervisors in completing applications for employment and other postal documents.

The parties' collective-bargaining agreement covering unit employees such as Fiore provides that ''no employee may be disciplined or discharged except for just cause.'' The agreement also provides for an extensive grievance-arbitration procedure.

Different rules apply to the discipline of supervisors. Section 650 of the U.S. Code states that adverse actions such as discharges of supervisors may be taken (a) because lesser measures have not resulted in the correction of deficiencies in behavior or performance or (b) because of the gravity of the offense.

The procedure followed, in the case of a discharge of a supervisor, is that a notice of proposed removal, with reasons, is issued to which the supervisor may respond. A hearing is held at which the supervisor is entitled to representation. The hearing officer issues a step I decision following the hearing, to which the supervisor may appeal to the postmaster general. The case is reviewed and a step II decision is issued. That decision is final.

B. *The Three Supervisors' Cases*

Hugo Gumbs, Respondent's divisional manager of labor relations, testified about these cases. All adverse actions against supervisors are reviewed at the divisional level of Respondent.

Robert Bevans—Bevans was accused of falsifying the timecard of an employee involving 45 minutes, during which he certified that the worker was working, when in fact the employee was at lunch. A notice of proposed removal was issued to Bevans. Bevans believed that the employee was working, when in fact she was at lunch. Respondent withdrew the case as it did not have a reasonable belief that Bevans knowingly falsified the timecard.

Bevans had no record of prior discipline or adverse action, and there was no evidence that he falsified his application for employment.

George Faulkner—Faulkner was issued a notice of proposed removal for four offenses: being absent without leave; failure to appear at the time and attendance proceedings; attempt to obtain payment for hours not worked; and unauthorized absence from his work area.

Faulkner's prior discipline consisted of a letter of warning for failure to follow instructions. There was no evidence that he falsified his application for employment.

Robert Malowich—Malowich was charged with three offenses: falsification of post office department (POD) form 57; off-duty conduct; and failure to adhere to Respondent's standards of conduct.

The POD 57 form is a document completed by the applicant for employment after his application is filed. That form is no longer used by Respondent, having been replaced by form 2591, which Fiore was accused of falsifying. Form 57 requests that the applicant list his prior employment, and the Respondent uses it to investigate the applicant's past record. Apparently the form contains a statement concerning arrests. At the time that Malowich completed the form in 1967 or 1968, he advised Respondent that he had an arrest record. Twenty years later, in 1988, Respondent received a report from its postal inspectors that Malowich had a prior arrest record. Without searching its records to determine whether Malowich had so advised Respondent, which he had 20 years before, Respondent issued this falsification charge against him. On being told that Malowich had disclosed his prior arrest record 20 years before, Respondent dismissed that allegation against him. Malowich had no prior discipline in his record.

Analysis and Discussion

The General Counsel argues that the Union is entitled to the three supervisors' files because they are relevant and necessary to the Union's case to show that Fiore was treated in a disparate manner.

Respondent argues that the information sought, involving the alleged misconduct and discipline of supervisors, is not relevant to the discipline of bargaining unit employees. It further contends that even if relevant, the information sought is overly broad, and documents concerning discipline of supervisors is confidential and privileged from disclosure, and would violate the Privacy Act. Respondent finally asserts that if a violation is found, the proper remedy is an order requiring the parties to bargain over what information should be provided.

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. [*NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967).]

The information requested here relates to supervisors—individuals outside the bargaining unit. In such circumstances, the union must show that the information sought is relevant. *Pfizer, Inc*., 268 NLRB 916, 918 (1984). The standard for determining the relevancy of the requested information is a ''liberal discovery-type standard.'' *NLRB v. Acme Industrial*, supra at 437. That standard ''merely requires that the information have some bearing on the issue between the parties.'' *Postal Service*, 289 NLRB 942 (1988), enf. 888 F.2d 1568 (1989).

In *Postal Service*, supra, certain unit employees were disciplined and discharged for violating the employer's regulations prohibiting gambling activity. The unions filed grievances and requested information concerning the discipline of supervisors who were engaged in the same activity. The employers' restrictions on gambling apply equally to supervisors and unit employees.

The employer refused to provide the information concerning supervisors, giving many of the reasons asserted here. The Board, finding the requested information to be relevant, stated that the information ''potentially has some bearing on whether the unit employees were harshly, unjustly, or disparately treated,'' and held that the employer's failure to furnish it violated the Act.

The General Counsel argues that the information regarding the discipline given the three supervisors for allegedly falsifying Postal Service documents has some bearing on Fiore's grievance involving discipline for falsifying his application for employment. The Union, in seeking such information, seeks to show that Fiore was given harsher discipline than, and was thus treated in a disparate manner, from the supervisors who were charged with falsification of documents.

Respondent argues that any discipline received by supervisors for allegedly falsifying Postal Service documents is not relevant to Fiore's grievance, since supervisors and unit employees have ''different responsibilities, are judged by different criteria and, therefore are not similarly situated for purposes of discipline.'' *Postal Service*, supra.

The Board, in rejecting this argument in *Postal Service*, supra, found that the prohibitions on gambling activity apply equally to supervisors and unit employees. While conceding that the employer properly may have had legitimate reasons for imposing different degrees of discipline on supervisors and unit employees for similar misconduct, such a difference in discipline was solely based on the supervisory and nonsupervisory status of the participants. The Board stated that given the nature of the prohibition and its applicability to both groups, the mere fact that supervisory and unit employees were involved does not automatically mean that different degrees of discipline were required to be given. The Board therefore reasoned that it could not be contended that the requested information has no bearing on the grievances of the unit employees.

On this point, the Board cited with approval *Department of Defense Dependent Schools*, 28 FLRA No. 33 (1987), a decision of the Federal Labor Relations Authority. Directly on point with respect to the instant issue, the FLRA:

> found information on adverse actions taken against supervisors for making false statements necessary to the union's representational responsibilities. The union sought the information as evidence of disparate treatment given to unit employees for engaging in the same misconduct as the supervisors, i.e., making false statements. [*Postal Service*, supra, 289 NLRB at 943 fn 8.]

Thus, John Karpjak, the director of city operations, testified that Respondent requires truthfulness from its employees in completing applications for employment and other Postal Service documents, and that this truthfulness requirement applies to supervisors and unit employees. Similarly, Hugo Gumbs, the divisional manager of labor relations, stated that Respondent's standard of conduct is that employees are supposed to be honest and trustworthy. It, therefore, may be argued that the same rule concerning falsification of documents, and honesty in the completion of Postal Service records, has been violated—by Fiore and by the supervisors. The arbitration decisions received in evidence at the hearing demonstrated that arbitrators in Postal Service cases have considered information concerning supervisors to be relevant in determining the issue of disparate treatment given to unit employees. Respondent may explain to the arbitrator the reasons for the difference in discipline given to the two groups.

In this connection, Respondent argues that the use of information concerning discipline of supervisors would have the practical effect of allowing the Union to dictate how supervisors are to be treated. This misses the point. A finding that such information is relevant does not lead to the conclusion that such a comparison between the discipline given to the two groups must cause the Postal Service to alter its discipline of supervisors. The discipline given to supervisors would be examined by an arbitrator who would consider the arguments of Respondent with respect to why the discipline of supervisors should differ from that given to unit employees.

Respondent further argues that the information sought is not relevant because the request seeks documents unrelated to the falsification of an application for employment, which Fiore was charged with. I disagree. Bevans was accused of falsifying an employee's timecard. Faulkner was charged with an attempt to obtain payment for hours not worked, which apparently involves an alleged falsification of a Postal Service certification of hours worked. Malowich was accused of falsification of a document used to support an application for employment. Accordingly, all the documents sought relate to dishonesty or falsification of Postal Service documents, which is the precise charge faced by Fiore.

Respondent correctly argues that Fiore's discipline was based on the falsification charge and his previous discipline record. It reasons that since the three supervisors did not have comparably poor past discipline records, the information sought could not be relevant to his discipline. These facts, too, may be brought to the arbitrator's attention. But for the purposes of the complaint here, the information ''need not necessarily be dispositive of the issues between the parties, it need only have some bearing on it.'' *Pfizer, Inc.*, supra, 268 NLRB at 918. ''This discovery-type standard decided nothing about the merits of the union's contractual claims.'' *Acme Industrial*, supra, 385 U.S. at 437.

I accordingly find and conclude that the General Counsel has established the relevance of the requested information.

Respondent argues that even assuming the relevance of the documents sought, such information may not be produced because it is confidential and privileged from disclosure. It asserts that the preservation of the loyalty of its supervisors outweighs the Union's interest in obtaining the information sought. It correctly argues that in *Postal Service*, supra, the Board rejected the employer's claim of confidentiality on the ground that the employees who were involved with the gambling activity were aware of the supervisors' participation in such activity, and that the supervisors who engaged in that activity already had compromised their loyalty and undermined their authority to enforce their employer's rules. However, that does not answer the question. Respondent argues that its supervisors may be subject to ''the threatening possibility of embarrassment and harassment amounting to a kind of 'blackmail.''' There is no evidence to support such a fear. In this case, the charges against Bevans and Malowich were withdrawn after investigation by Respondent, and it does not appear that the Union would be able to ''threaten'' those supervisors with information relating to charges having no merit. In addition, the charge against Faulkner, as with any supervisor charged with misconduct, would be considered on its merits by Respondent after the alleged impropriety became known by it. If individual unit employees or the Union engaged in improper conduct with respect to information it obtained for its use in a grievance proceeding, Respondent could effectively deal with that. In addition, there is no showing that the supervisors expected the requested information to remain confidential or that the Respondent made a commitment to them to keep the information confidential. The charge made against the supervisors, falsification of Postal Service documents, is a very serious accusation as to which the supervisors could have no expectation of confidentiality.

Accordingly, I find and conclude that Respondent's interest in keeping the information confidential does not outweigh the Union's interests in having the information disclosed.

Respondent finally argues that disclosure of the information would violate the Privacy Act of 1974. Respondent asserts that the Privacy Act protects any record contained in a Postal Service system of records from disclosure without prior written consent of the individual to whom the record pertains, unless that disclosure meets certain exceptions, including the routine use exception:

> Pursuant to the National Labor Relations Act, records from this system may be furnished to a labor organization upon its request when needed by that organization to perform properly its duties as the collective bargaining representative of postal employees in an appropriate bargaining unit.

Respondent argues that the information sought is irrelevant to Fiore's grievance. I have found that such information is relevant for that purpose. Accordingly, the disclosure of such information is mandated by the Privacy Act because its use is precisely for such purposes recognized by the Privacy Act—the ability of the Union to properly perform its duties as the collective-bargaining representative of the unit employees.

I accordingly find and conclude that Respondent has violated Section 8(a)(5) and (1) by failing and refusing to furnish the requested information to the Union.

Respondent finally argues that even assuming that a violation is found, the proper remedy is to require it to bargain with the Union in order to make ''mutually satisfactory arrangements for the appropriate disclosure of confidential information.'' Inasmuch as have found that the information sought is not confidential, and that the refusal to furnish it to the Union violated the Act, an appropriate remedy would be undermined by requiring the parties to bargain over whether documents should be produced.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent by virtue of section 1209 of the Postal Reorganization Act.

2. The APWU is a labor organization within the meaning of Section 2(5) of the Act, and the Charging Party is an agent of the APWU.

3. At all relevant times, the APWU has been the exclusive collective-bargaining representative of the following employees of Respondent in an appropriate bargaining unit within the meaning of Section 9(b) of the Act:

> All maintenance employees, special delivery messengers, motor vehicle employees and postal clerks employed by Respondent including its Paterson, New Jersey location.

4. By refusing to furnish information requested by the Union concerning the disciplinary records of Supervisors Robert Bevans, George Faulkner, and Robert Malowich, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist and that it take certain affirmative action necessary to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, United States Postal Service (Paterson Office), Paterson, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, New Jersey Area Local, American Postal Workers Union, AFL–CIO, by refusing to furnish it with the requested case files of Supervisors Robert Bevans, George Faulkner, and Robert Malowich, and the decision for Supervisor George Faulkner, which relate to disciplinary action taken against them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with the requested case files of Supervisors Robert Bevans, George Faulkner, and Robert Malowich, and the decision for Supervisor George Faulkner, which relate to disciplinary action taken against them.

(b) Post at its facility in Paterson, New Jersey, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''